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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 78/094,376
Published in the *Official Gazette* on August 19, 2003

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DR PEPPER/SEVEN UP, INC., :
: Opposer,
: - against - :
PAUL L. JORDAN, :
: Applicant.
-----X

Opposition No.

NOTICE OF OPPOSITION



Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

12-10-2003

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

BOX TTAB - FEE

Dr Pepper/Seven Up, Inc. ("Opposer"), a corporation duly organized and existing under the laws of the state of Delaware doing business at 5301 Legacy Drive, Plano, Texas 75024, believes that it will be damaged by the issuance of a registration for the trademark 8UP and Design applied for in intent-to-use application Serial No. 78/094,376, filed November 20, 2001 for "T-shirts, shorts, jackets, sweaters, pants, hats, caps, footwear" in International Class 25 and therefore opposes the same. As grounds for the opposition, Opposer, by its attorneys Fross Zelnick Lehrman & Zissu, P.C., alleges as follows:

1. Opposer is responsible for the distribution of some of the most famous brands of beverages in the United States, including but not limited to 7UP. The 7UP mark has been used in connection with beverages since 1936. By the late 1940s, 7UP had become the third best selling beverage in the world. Over the years the family of beverages under the 7UP mark has

expanded to include 7UP, DIET 7UP, CHERRY 7UP and DIET CHERRY 7UP. Sales of 7UP branded beverages in the U.S. over the last three years exceed \$1 billion (U.S.) dollars.

2. The 7UP mark and its phonetic equivalent SEVEN UP have been used as part of advertising tag lines for Opposer's (and its predecessor's) beverages as well as promotional items. Among the advertising slogans used by Opposer or its predecessors in interest are FEELIN' 7UP (1980-1982), AMERICA'S TURNING 7 UP (1982), 7UP IT'S AN UP THING (1996-1997) and MAKE 7UP YOURS (2000-present).

3. Over the last several decades, Opposer and its predecessors have devoted and continue to devote significant resources to advertise and market 7UP brand beverages throughout the United States. The 7UP brand is advertised on television, radio, outdoor media, local events as well as through coupons and in-store displays. In addition, the 7UP mark has appeared on literally hundreds of millions of cans and bottles of soda. Opposer and its predecessors have spent tens of millions dollars on advertising and marketing featuring the 7UP mark.

4. As a result of the fame and recognition of the 7UP mark, there has been consumer demand for products bearing the trademark. For at least ten years, and prior to any date on which Applicant can rely, Opposer or its predecessors-in-interest have offered for sale a variety of products bearing the 7UP mark including but not limited to sweatshirts, jackets, pullovers, visors, t-shirts, caps, wind shirts, golf shirts, and denim shirts. Opposer and its predecessors also have offered and offer for sale such goods as portfolios, key chains, sunglasses, lapel pins, tote bags, mugs, watches, pens, coolers, golf towels, pocket knives and other items all of which bear the 7UP mark.

5. Among the trademark registrations owned by Opposer for the 7UP mark are:

<u>Mark</u>	<u>Registration No.</u>	<u>Date of Registration</u>	<u>Goods</u>
*SEVEN UP	754,309	August 6, 1963	Candy
*7.UP	801,421	January 4, 1966	soft drinks
*SEVEN-UP	816,189	October 4, 1966	soft drinks, syrups and extracts for making the same
*7-UP	1,676,040	February 18, 1992	soft drinks and syrups and extracts for making the same.

Opposer's registrations are valid, subsisting and in full force and effect. In addition, those registrations marked by an asterisk are incontestable thereby serving as conclusive evidence of the validity of the marks, Opposer's ownership of the marks and Opposer's exclusive right to use the mark identified in the registration in connection with the goods set forth therein.

6. For many years, and long prior to any date on which Applicant can rely, Opposer and its predecessors-in-interest have displayed the 7UP mark in a distinctive graphic which is shown on Exhibit A. This graphic appears on product sold or offered for sale by the Opposer, on Opposer's advertising and on millions of bottles and cans of soda.

7. Through its years of use and advertising and as a result of the expenditure of significant resources by Opposer, its predecessors-in-interest and its distributors, the word mark SEVEN UP, the 7UP mark and the 7UP and Design mark as shown in Exhibit A (collectively the "7UP Marks") have come to be associated with Opposer, represent enormous goodwill of Opposer and identify and distinguish the goods of Opposer from those of others.

8. On November 20, 2001, Applicant Paul L. Jordan, a U.S. citizen with an address of 7928 Coral Street, #41, Hypoluxo, Florida 33462, filed an intent-to-use application to register the mark 8UP and Design for "T-shirts, shorts, jackets, sweaters, pants, hats, caps, footwear" in International Class 25.

9. Applicant presents its mark in a design format virtually identical to the design used by Opposer for its 7UP mark as shown in Exhibit A.

10. The filing date of the application herein opposed and the only date on which Applicant can rely is subsequent to Opposer's date of first use of its 7UP Marks and subsequent to the dates on which Opposer received its registrations for its 7UP and SEVEN UP marks noted above.

11. Upon information and belief, Applicant had actual knowledge of Opposer's prior rights to and interest in the 7UP Marks as well as in the recognition and goodwill Opposer had developed in the 7UP Marks. In addition, as a matter of law, Applicant was on constructive notice of Opposer's rights in its 7UP and SEVEN UP marks based on Opposer's registrations therefor.

12. The mark 8UP and Design sought to be registered by Applicant is virtually identical to Opposer's prior used 7UP Marks, is displayed in a design format long used by Opposer and otherwise has a similar connotation, appearance and commercial impression to Opposer's prior used marks.

13. Applicant seeks to register the mark 8UP and Design for clothing. The goods identified in the application are products that Opposer or its predecessors have been selling for years under the 7UP mark.

14. Applicant has not restricted its customers or channels of trade and thus it is presumed that Applicant will sell clothing under the 8UP and Design mark to Opposer's very customers through the same channels of trade used by Opposer. Indeed, both Applicant and Opposer use the Internet to advertise and promote their products. Given the renown of Opposer's 7UP Marks, Applicant's registration and use of a mark that is almost identical to Opposer's Marks in connection with identical goods sold through the same channels of trade to the same consumers is likely to cause confusion.

15. Registration of Applicant's mark is inconsistent with Opposer's prior rights in its 7UP Marks, is inconsistent with Opposer's statutory grant of exclusivity of use of the registered 7UP and SEVEN UP marks, and would destroy Opposer's investment and goodwill in its 7UP Marks.

CLAIM FOR RELIEF UNDER SECTION 2(d)

16. Opposer repeats and re-alleges each and every allegation contained in paragraphs 1 through 15 as if fully set forth herein.

17. The 7UP Marks are associated exclusively with Opposer and have been used continuously by Opposer since a date prior to any date on which Applicant can rely.

18. Applicant's mark 8UP and Design trades on and is a colorable imitation of Opposer's registered and prior used 7UP Marks and is sought to be registered for goods identical to those offered under the 7UP Marks.

19. By virtue of the use of the 7UP Marks by Opposer and its predecessors, the goodwill associated with Opposer's Marks, the registrations owned by Opposer for 7UP and SEVEN UP, and the fame of the 7UP Marks, the registration by Applicant of a mark that is a colorable imitation of Opposer's 7UP Marks, and that copies the very design element long used

by Opposer, for goods identical to those provided by Opposer under its Marks is likely to create the erroneous impression that Applicant's goods originate from, come from or are otherwise associated with Opposer or that Applicant's goods are endorsed, sponsored or in some way connected with Opposer. Registration of the mark 8UP and Design in connection with the goods set forth in Application S.N. 78/094,376 is likely to cause confusion, cause mistake, or to deceive the public into the belief that the goods offered by Applicant under the mark 8UP and Design come from or are otherwise sponsored by Opposer in violation of Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

20. By reason of the foregoing, Opposer is likely to be harmed by registration of Application S.N. 78/094,376 for the mark 8UP and Design.

CLAIM FOR RELIEF UNDER SECTION 2(f)

21. Opposer repeats and re-alleges each and every allegation contained in paragraphs 1 through 15 as if fully set forth herein.

22. Opposer's 7UP, SEVEN UP and 7UP and Design marks are inherently distinctive, have been used for many years in connection with a wide range of goods including beverages, clothing and accessories, have been used in connection with goods sold and advertised nationally, have become famous among consumers, and are the subject of numerous federal trademark registrations. As a result, the marks are famous mark under the Lanham Act.

23. Applicant's application to register 8UP and Design was filed after Opposer's 7UP Marks became famous.

24. Registration of the mark 8UP and Design to Applicant would dilute the distinctive quality of Opposer's 7UP Marks in that the registration of 8UP and Design would lessen the capacity of the 7UP Marks to identify and distinguish goods exclusively from Opposer.

25. Registration of the mark 8UP and Design is likely to dilute the 7UP Marks in violation of Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f).

26. By reason of the foregoing, Opposer is likely to be harmed by registration of Application S.N. 78/094,376 for the mark 8UP and Design.

WHEREFORE, it is respectfully requested that this opposition be sustained and that the registration sought by Applicant in Application S.N. 78/094,376 be denied.

Enclosed is a check for the Notice of Opposition filing fee in the sum of \$300. To the extent that there is any payment due to the Trademark Trial and Appeal Board or to the extent that there is any overpayment, the Trademark Trial and Appeal Board is hereby authorized to charge any additional opposition filing fee or to credit any extra payment to Opposer's deposit account No. 23-0825-0576900.

Dated: New York, New York
December 10, 2003

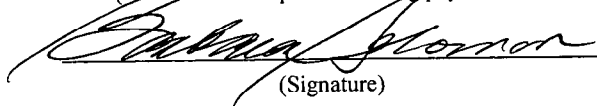
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Date of Deposit: December 10, 2003

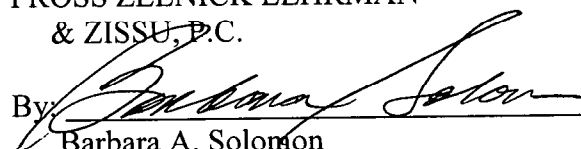
I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513.

Barbara A. Solomon

(Printed name of person mailing paper of fee)


(Signature)

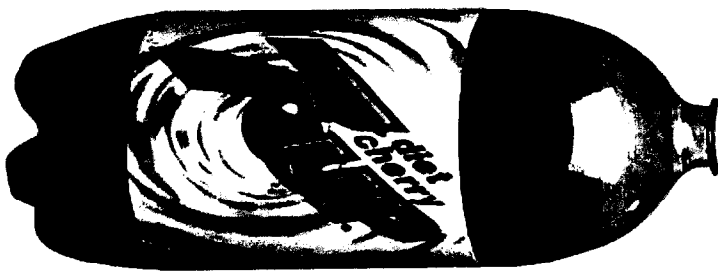
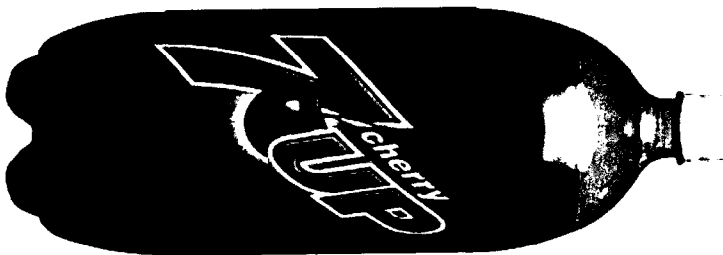
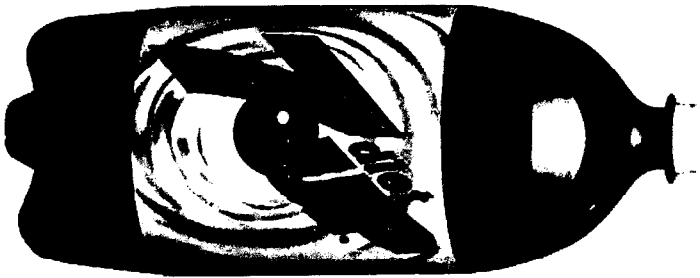
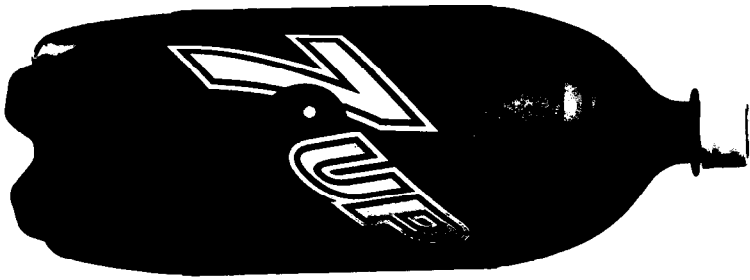
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Inc.

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EXHIBIT A





C72C_wbx

(Cherry 7 UP 2 color extreme reduction logo for use on white background)



D72C_wb

(Diet 7 UP 2 color logo for use on white background)



DC72C_wb

(Diet Cherry 7 UP 2 color logo for use on white background)